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In the Supreme Court of the United States

OCTOBER TERM, 1946.

No. .....

BEN F. HOPKINS,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Sixth Circuit.

To the Honorable the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

SUMMARY STATEMENT OF MATTERS INVOLVED.

This case arose on the petition of a taxpayer, the petitioner herein, to the Circuit Court of Appeals for the Sixth Circuit, to review a decision of the Tax Court of the United States. The decision of the Circuit Court of Appeals, of which review is herein sought, affirmed a decision of the Tax Court of the United States. This was the second review by the Circuit Court of Appeals of the action of the Tax Court in this case. The first decision of the Circuit Court of Appeals is reported at 144 F. (2d) 683 and was designated as Docket No. 9,566 of the Circuit Court of Appeals. The opinion appears in the Record at page 137. The decision of the Tax Court and the second review of the Circuit Court of Appeals involved facts adduced in part at the first hearing before the Tax Court and in part at

the second hearing before the Tax Court. To avoid reprinting the entire record on the second review the Circuit Court of Appeals entered an order which, in effect, directed that the record on the first review was to be considered as a part of the record on the second review. (Record, p. 153.) The second review in the Circuit Court of Appeals was designated as Docket No. 10,183. Both records accordingly are included in the record accompanying this petition.

On the first review the Circuit Court of Appeals reversed a determination of the Tax Court which had sustained deficiencies in income tax asserted against the petitioner by the respondent for the years 1936 to 1939 inclusive in the aggregate amount of $84,972.79. (Record, p. 133.) The Circuit Court of Appeals, however, on the first review directed the Tax Court to reconsider and determine the tax liability of the petitioner under the provisions of Section 22(a) of the Revenue Acts of 1936 and 1938. (See Appendix.) The Tax Court, after taking additional evidence, thereupon sustained deficiencies for those years in the same amount under the provisions of Section 22(a). (Record, p. 95.) The last mentioned decision of the Tax Court gave rise to the second review in the Circuit Court of Appeals and review of that decision is herein sought.

The decision of the Circuit Court of Appeals was to the effect that the income of two trusts established by the petitioner, each for the benefit of a minor son, should be included in the petitioner's individual income under the provisions of said Section 22(a).

Each trust instrument, the trusts being identical, provided a life estate for a son of the petitioner, with a gift over to others at the death of the son on default of the exercise of a testamentary power of appointment given to the son. During the minority of the son, the income was to be accumulated and added to principal and thereafter was to be paid to the son currently. Each agreement con-

tained a proviso that, during the life of the grantor, there should be paid to the son such amounts of the income or principal as the grantor might direct for the best interests of the son. (Record, pp. 98-99.) The petitioner and a large bank were designated as and acted as trustees of the trusts. (Record, p. 97.) All administrative powers required the unanimous action of both trustees. There was no prospect of reversion or other benefit to the petitioner. The trusts contained provisions customarily included in trusts created in the community of the petitioner's residence. (Record, p. 119.)

The trusts were established by the petitioner when the sons were respectively 15 and 16 years of age. The purpose of the trusts was to assure the sons the necessities of life as long as they lived, regardless of other financial situations. (Record, p. 103.)

On a prior review of an earlier decision of the Tax Court involving the application of Section 167, the Circuit Court of Appeals had given careful and lengthy consideration to the interpretation of the agreements and held that the income of each trust was distributable, without any discretion to withhold, after the son attained the age of 21 years. (Record, p. 143.) Upon remand of the case for the consideration of the petitioner's tax liability under the provisions of Section 22(a), the Tax Court, without discussing the question, adopted in its second decision an exactly contrary construction and held that the income was to be withheld or distributed in the discretion of the grantor during the lifetime of the grantor. (Record, p. 108.) The Tax Court based its decision on the continuation of this alleged power during the lifetime of the grantor. On the second review in the Circuit Court of Appeals (the decision presently involved), the Circuit Court of Appeals, on the day following the argument, affirmed the decision of the Tax Court without opinion "* * * upon the grounds and for the reasons stated in the opinion of the Tax Court of the United States * * *." (Record, p. 155.)

JURISDICTIONAL STATEMENT.

The Supreme Court has jurisdiction to review the judgment here in question under Section 240(a) of the Judicial Code, as amended by the Act of Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938, 28 U. S. C. § 347(a), providing that in any case in a Circuit Court of Appeals, it shall be competent for the Supreme Court, upon the petition of any party thereto, to require by certiorari that the cause be certified to the Supreme Court for determination by it.

QUESTIONS PRESENTED.

The questions here presented are:

1. Whether the retention by the grantor of an irrevocable trust of the power to distribute to or withhold income from the life beneficiary of the trust as the grantor shall deem for the "best interests" of the beneficiary constitutes such control over the income of the trust as to require taxation of such income to the grantor under Section 22(a) of the Internal Revenue Code, pursuant to *Helvering v. Clifford,* 309 U. S. 331 (1940).

2. Whether by affirming without opinion an interpretation of the trust instrument by the Tax Court which was the basis of the Tax Court's decision and which was squarely in conflict with the prior decision of the Circuit Court of Appeals on the same point, the Circuit Court so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

REASONS FOR THE ALLOWANCE OF WRIT.

1. The decision of the Circuit Court of Appeals is in conflict with the decisions in

a. *Hawkins v. Commissioner,* 152 F. (2d) 221 (C. C. A. 5, 1945), which held that the retention by the grantor of control over the income of a trust does not subject him to tax on that income; and

b. *Hall v. Commissioner,* 150 F. (2d) 304 (C. C. A. 10, 1945), which held that a power to require accumulation of income of a trust, which has the incidental effect of transferring accumulated income from the current beneficiary to the remainderman, is not such control over income as will justify taxing it to the grantor.

2. The Circuit Court of Appeals has decided a federal question, the application of Section 22(a) of the Revenue Acts of 1936 and 1938, in a way probably in conflict with applicable decisions of this Court:

a. In *Helvering v. Clifford,* 309 U. S. 331 (1940), which decision indicated that the income of a trust is to be included in that of the grantor under said Section 22(a) only where the combination of factors involved, such as the reversion to the grantor after a short term, the absolute discretionary power of the grantor over distribution of income, and the complete administrative power of the grantor as sole trustee, was such that the grantor continued in effect to be the owner of the property.

b. In *Helvering v. Stuart,* 317 U. S. 154 (1942), which decision indicated that economic gain realized or realizable by the grantor of a trust is necessary to require the income of a trust to be included in that of the grantor, that non-material satisfactions of a donor in creating a trust are not to be taken into account in determining taxability, that a power to distribute or accumulate income for the economic advantage of the beneficiary, circumscribed by fiduciary

responsibilities, is not a control over a trust so complete that the taxpayer is the owner of the income.

3. The Circuit Court of Appeals has decided an important question of federal law which has not, but which should be settled by this Court, namely, whether the retention by the grantor of an irrevocable trust of the power to distribute to or withhold income from the life beneficiary of the trust as the grantor shall deem for the "best interests" of the beneficiary constitutes such control over the income of the trust as to require taxation of such income to the grantor under Section 22(a) of the Internal Revenue Code, pursuant to *Helvering v. Clifford*, 309 U. S. 331 (1940), there having been no other decision of any Court holding such a power over income sufficient to require taxation of the income to the grantor in the absence of very broad administrative control reserved to the grantor.

4. The Circuit Court of Appeals, by affirming without opinion an interpretation of the trust instrument by the Tax Court, which was the basis of the Tax Court's decision and which interpretation was squarely in conflict with the prior decision of the Circuit Court of Appeals in the same case, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket, No. 10,183, *Ben F. Hopkins, Petitioner, v. Commissioner of Internal Revenue, Respondent*, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment

herein of said Circuit Court of Appeals be reversed by the Court and for such further relief as to this Court may seem proper.

Dated April 25, 1947.

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In the Supreme Court of the United States

OCTOBER TERM, 1946.

No. .....

BEN F. HOPKINS,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS OF COURTS BELOW.

The Circuit Court of Appeals rendered its decision in this case on October 18, 1946, its decision being reported in 157 F. (2d) 679. (Record, p. 155.) Rehearing was denied February 6, 1947. (Record, p. 167.) The findings of fact and opinion of the Tax Court in this case were entered September 27, 1945, being reported in 5 T. C. 803. (Record, p. 95.) The memorandum opinion of the Tax Court on the first hearing appears at page 15 of the record, and the opinion of the Circuit Court of Appeals on the first review is reported at 144 F. (2d) 683. (Record, p. 137.)

JURISDICTION.

1. The date of the judgment to be reviewed is October 18, 1946. Petition for rehearing was filed November 6, 1946, and denied February 6, 1947, and this petition will be presented within ninety days thereafter.

The statutory provision sustaining jurisdiction is Section 240(a) of the Judicial Code, as amended by the Act of Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938, 28 U. S. C. § 347 (a), which permits this Court to require, by certiorari, cer-

tification of cases in the Circuit Courts of Appeals for determination by this Court.

STATEMENT OF THE CASE.

The history and facts of the case are stated in the Petition for Writ of Certiorari, in support of which this brief is submitted. The facts will therefore not be repeated here.

ERRORS RELIED UPON.

The United States Circuit Court of Appeals, by its adoption of the judgment and reasoning of the Tax Court, erred:

1. In holding that the retention by the grantor of an irrevocable trust of the power to distribute to or withhold income from the life beneficiary of the trust as the grantor shall deem for the "best interests" of the beneficiary constitutes such control over the income of the trust as to require taxation of such income to the grantor under Section 22(a) of the Internal Revenue Code, pursuant to *Helvering v. Clifford*, 309 U. S. 331 (1940).

2. In basing the decision upon the co-existence of alleged control over income and "other broad powers" when in fact, the petitioner and a large bank were trustees of the trusts and administrative powers could be exercised only by the joint action of the petitioner and the bank; and in basing its decision upon the existence of such "other broad powers" without ever having determined or found as a fact that any such powers existed.

3. In holding, if it did so hold, that each trust instrument, as a matter of law, permitted the grantor in his discretion, during his life, to direct the accumulation of the income after the beneficiary became of age.

4. In holding that the income of the trusts was required to be included in that of the grantor under the

authority of *Helvering v. Clifford*, 309 U. S. 331 (1940), and *Helvering v. Stuart*, 317 U. S. 154 (1942), and under the provisions of Section 22(a) of the Internal Revenue Code.

SUMMARY OF ARGUMENT.

1. The decision of the Circuit Court of Appeals is in conflict with *Hawkins v. Commissioner*, 152 F. (2d) 221 (C. C. A. 5, 1945), in that that decision held that the retention by the grantor of a trust of complete power to change the beneficial interests, short of requiring disposition to himself, did not justify taxing the grantor on the income, at least in the absence of other elements, indicating that he remained in substance, the owner; while the decision below held that retention of a much more limited power over income required taxation of the grantor, notwithstanding the absence of such other elements.

The decision below is also in conflict with *Hall v. Commissioner*, 150 F. (2d) 304 (C. C. A. 10, 1945), in that that case held that a power to require accumulation of income, which would have the incidental effect of transferring the amount so accumulated to the ultimate remainderman, did not amount to control over the beneficial interests so as to permit taxing the grantor even where the grantor, the sole trustee, had complete administrative control of the trust property; while the decision below held that such a power amounted to a power "to sprinkle the income about among the beneficiaries" and thus made the grantor subject to tax as the substantial owner.

2. The decision below is in conflict with *Helvering v. Clifford*, 309 U. S. 331 (1940), in that that case indicates that the grantor is to be taxed on the income of a trust only where he has retained so many of the rights of ownership that he may be said to have remained in substance the owner; while the decision below holds that taxation of the grantor was required where he retained none of the elements emphasized in the *Clifford* case, liability being predi-

cated instead on the very limited control of the grantor over distributions of income.

The decision is also in conflict with *Helvering v. Stuart*, 317 U. S. 154 (1942), in that that case held that economic gain realized or realizable by the taxpayer is an essential element, while the decision below relied on the existence of a limited power which could not be exercised for the economic gain of the taxpayer.

3. The question of law involved is one which has not been, but should be, settled by this Court. The decision in *Helvering v. Clifford, supra*, has given rise to voluminous litigation in the lower courts. The lower courts have been unable to determine the limits of its application, and have in their opinions recognized the need for clarification by this Court. The decision below should be selected for such review because it represents the most extreme extension of the so-called *Clifford* doctrine so far announced, and because it presents a clear cut issue as to the application of the *Clifford* rule to provisions which are not susceptible of use for tax evasion.

4. The Circuit Court of Appeals, by affirming without opinion an interpretation of the trust instrument by the Tax Court, which was the basis of the Tax Court's decision and which interpretation was squarely in conflict with the prior decision of the Circuit Court of Appeals in the same case, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

5. Review of the decision by the Circuit Court of Appeals is not prevented by the rule of *Dobson v. Commissioner*, 320 U. S. 489 (1943), because the question involved is purely a question of law, and because the courts below have considered that their decision involved the application of principles of law enunciated by this Court and other courts.

ARGUMENT.

1. The decision of the Circuit Court of Appeals is in conflict with Hawkins v. Commissioner, 152 F. (2d) 221 (C. C. A. 5, 1945) and Hall v. Commissioner, 150 F. (2d) 304 (C. C. A. 10, 1945).

The conflict between the decision in the present case and those cited above involves the application of another Circuit Court of Appeals decision, that of *Commissioner v. Buck*, 120 F. (2d) 775 (C. C. A. 2d, 1941) and a brief explanation of the *Buck* case will facilitate understanding of the problem.

The *Buck* case applied the decision of this Court in *Helvering v. Clifford*, 309 U. S. 331 (1940), to a situation where the grantor of an irrevocable trust had reserved a power, among others, to change the provisions for distribution to the beneficiaries in any manner. While the court in the *Buck* case emphasized the grantor's power to determine the beneficial enjoyment of the income, the decision actually rested on a combination of powers so extensive that the grantor was considered to have remained in effect the owner of the property. The basis of the Court's decision is indicated in the following statement by Judge Frank which is often quoted:

> "During his life, he has entire control of the sale and investment of the corpus, in whole or in part, and the voting power of any stock now or later constituting that corpus. *When to such control there is coupled the power, until his death, freely to sprinkle the income about among any beneficiaries he may select (as if he were playing a hose)*, it is impossible to conclude, in the light of the recent decisions of the Supreme Court, that the income is not taxable to him." (Emphasis supplied.)

The *Buck* case may be said to stand for the proposition (1) that a reversion after a short term need not be present if the grantor's control is otherwise so broad as to make

him substantially the owner, and (2) that the power to allocate income *among the beneficiaries* is an important element to be taken into account, *in combination with other powers,* in determining whether such control existed.

The *Hawkins* case, the *Hall* case, and the present case all involve situations in which it was contended that the grantor, by virtue of a power which he had with respect to income, retained such control as to remain the owner of the trust. The *Hawkins* case held that to tax the grantor because of a power to allocate income among the beneficiaries, at least in the absence of the other extreme powers noted in the *Buck* case, would be contrary to the decision of the Supreme Court in *Helvering v. Stuart, supra.*

In the *Hawkins* case the grantor did have the power to choose among current beneficiaries. He had reserved the right to "* * * alter or modify the provisions of distributions as herein set forth to the beneficiaries." The only limitation on his power over distributions was that he could not revest any of the principal or income in himself. It thus appears that the power to allocate income in the *Hawkins* case was substantially similar to that in the *Buck* case. The Circuit Court of Appeals nevertheless held that the income was not taxable to the grantor, reversing the Tax Court. The majority opinion stated that the Court need not concern itself with the correctness of the *Buck* and other decisions cited by the Tax Court where control of income was involved because such cases presented other elements of control and benefits reserved by the settlor or actually exercised by him. A later decision in the same circuit, *McCutchin v. Commissioner,* 159 F. (2d) 472 (C. C. A. 5, 1947), has clarified the *Hawkins* case by indicating that where there are present other circumstances, such as the fact that the trustee was controlled by the grantor and that the trusts appeared to be manipulated for the benefit of the grantor, the income may be taxed to the

grantor as the owner of the property. The court indicated, however, that it considered the *Hawkins* case still to be good law.

It thus now appears that the law in the Fifth Circuit is that even the extremely broad power to control the distribution of income in any manner and to any person except the grantor himself is not alone sufficient to permit taxation of the grantor on income, but that such a power must be combined with such other powers as were found in the *Buck* case.

In the present case the Tax Court, and the Circuit Court of Appeals by adopting the opinion of the Tax Court, held that the petitioner had the power to "spray" the income among the beneficiaries of the trust, and that he therefore was taxable on the income. The Tax Court said in its opinion:

> "It is obvious, we think, that the petitioner under section 15 had the right to 'spray' the net income of the trusts as between primary beneficiaries and the remaindermen within the thought of *Commissioner v. Buck*, 120 F. (2d) 775, and more particularly within the decision in *Stockstrom v. Commissioner*, 148 F. (2d) 491, affirming 3 T. C. 255." (Record p. 104.)
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> "• • • he had the power to direct the benefits of the trusts either to the limited beneficiaries under the wills of his sons, or, upon their intestacy, to their issue or their widows, or in default thereof to a certain foundation in Cleveland, Ohio." (Record, p. 108.)

The power which the petitioner had over the income was not a broad power to "spray" the income, as in the *Hawkins* and *Buck* cases. It was not a power to choose to any extent among current beneficiaries. The Tax Court said that the petitioner here could select between the current beneficiary and the remainderman. This, however, gave him no real choice, since the issue of the minor sons

were not then known to the grantor and in addition the grantor's son had a power of appointment over the remainder. Thus the ultimate disposition of any income which had been accumulated would be within the control not of the grantor but of the beneficiary. To hold under such circumstances that the grantor had the power "freely to sprinkle the income about" is preposterous. The Tax Court's assertion to this effect, approved by the Circuit Court of Appeals, clearly shows the conflict between this case and the *Hawkins* case, where a contrary result was reached on facts more favorable to the government.

Nor are there other elements presented in the present case which can be said to distinguish it from the *Hawkins* case or which can be said to bring the present case within the principle of the *Buck* decision. In the *Hawkins* case the trustee was a bank. In the present case a bank and the petitioner were co-trustees, but administrative powers could be exercised only with the participation of the bank as co-trustee and the Tax Court found that the corporate trustee and not the grantor in fact exercised the administrative powers. (Record p. 103.) The situations in the *Hawkins* case and in the present case are thus essentially the same in this respect. It is true that the Tax Court's decision referred in passing to "other broad powers" (Record p. 104), but it will be noted that the Court did not hold either in its opinion or in its findings that there *were* any such powers. The only evidence in the case on this question is the testimony to the effect that the administrative powers were those usual and customary in the community.

The decision below may be said to stand for the proposition that a power to withhold income from a current beneficiary is sufficient to require taxation of the income to the grantor even in the absence of broad management powers reserved to the grantor alone. Such a distortion of the rule of the *Buck* case is squarely in conflict with *Hawkins v. Commissioner.*

Hall v. Commissioner, supra, 150 F. (2d) 304 (C. C. A. 10, 1945), involved a power with relation to income which is somewhat closer to that involved in the case at bar. The question there was whether a power to require the accumulation of income, which would have the incidental effect of transferring it from the present income beneficiaries to the remainderman in the event of the death of the beneficiary before distribution to him, was such a power over the income as to justify the conclusion that the grantor was the owner thereof. In the *Hall* case, as in the present case, there was no power to select among present or living beneficiaries. The grantor, who was also the sole trustee, had reserved the power to distribute the income to the beneficiaries, his four daughters, "in equal shares at any time in the discretion of the trustee," and in addition to expend from principal amounts reasonably necessary for specified purposes. The trust provided for gifts over to issue of deceased beneficiaries, and on default of issue, for a reverter to the grantor. After fifteen years the remaining corpus was to be distributed to the then beneficiaries. No income had ever been distributed.

The Tenth Circuit Court reversed the holding of the Tax Court, which had been to the effect that the grantor was taxable because he had a right to "sprinkle the income about among any beneficiaries he may select," within the rule of the *Buck* case. The decision of the Circuit Court was reached in spite of the fact that the grantor had a possibility of reverter, and, as *sole* trustee, had "unlimited powers of investment, contract, compromise, sale, lease and otherwise." It thus appears that in the Tenth Circuit a power with relation to income which consists only of a power to withhold distributions and thus augment the interest of the ultimate remaindermen is not such a control of income as will permit application of the *Buck* rule, even though numerous other factors found significant in the *Buck* and *Clifford* cases are present.

The Tax Court in the present case undertook to distinguish the *Hall* case on the ground that in the *Hall* case the trust was to last for a period of 15 years whereas (as the Tax Court erroneously assumed) the petitioner had that power "during the lifetime of the beneficiary." The Tax Court gives the following quotation from the Circuit Court's decision in the *Hall* case to justify this distinction:

> "* * * In our case the trustee was authorized in his discretion to withhold the distribution of income, but he could not shift it from one beneficiary to another—nor could he hold it during his lifetime or the lifetime of the beneficiaries as in the *Stockstrom* and *Miller* cases, and cited therein. The trustee could not change the beneficial interest of the beneficiary; he was not authorized or empowered to 'reduce or obliterate' the share of principal or interest originally allocated to any of the beneficiaries. At the expiration of the trust, fifteen years from the date of its execution, the corpus and economic income must be distributed to the beneficiaries or their issue. * * *."

Contrary to the assumption of the Tax Court the language from the opinion in the *Hall* case does not indicate that the power to withhold income which might go to another beneficiary upon the death of the primary beneficiary is a "spray" or "sprinkle" provision. The Court in the *Hall* case must have known that upon the death of any one of the five beneficiaries of the trust within the period of 15 years, a circumstance not unlikely to happen, accumulated income would go to another person. Yet the Court said "The trustee could not change the beneficial interest of the beneficiary." The *Hall* case is in fact authority for the proposition that any such withholding is not a shift "from one beneficiary to another" within the meaning of the *Buck* rule, and is not a power "to change the beneficial interest of the beneficiary." There is no essential difference between a power to withhold income from the beneficiary of a 15 year trust and a power to withhold from the

beneficiary of a longer trust, especially when the beneficiary of the longer trust has a power of appointment over the accumulated income. In both situations any power of selection is limited and the possibility of a real selection is even more tenuous in the latter case. The essential difference between the two cases lies in the fact that in the *Hall* case it was held that such a power is not a power to change the beneficial interest of a beneficiary while in the present decision the exactly contrary conclusion was reached.

2. The Circuit Court of Appeals has decided a federal question, the application of Section 22(a) of the Revenue Acts of 1936 and 1938, in a way probably in conflict with applicable decisions of this Court, particularly Helvering v. Clifford, 309 U. S. 331 (1940), and Helvering v. Stuart, 317 U. S. 154 (1942).

In *Helvering v. Clifford, supra,* this Court departed from the previous concept that the taxation of the income of a trust was controlled exclusively by the sections of the internal revenue law which dealt specifically with that subject, and decided that, under the facts there presented, the income of a trust was taxable to the grantor under the provisions of Section 22(a) of the applicable Revenue Act (see Appendix) (now Section 22(a) of the Internal Revenue Code). This is the so-called "gross income" section which defines gross income in general terms.

The trust in the *Clifford* case was to last for five years, with a possibility of earlier termination, and the corpus was to revert to the settlor at the end of the term. The settlor was the sole trustee and had practically unlimited investment and administrative powers; he also had absolute discretion to determine how much, if any, of the income was to be paid over to his wife, who was the income beneficiary.

On those facts, the Supreme Court had no difficulty in deciding that:

> "• • • the short duration of the trust, the fact that the wife was the beneficiary, and the retention of control over the corpus by respondent all lead irresistibly to the conclusion that respondent continued to be the owner for purposes of § 22(a)."

This Court said, moreover,

> "that no one fact is normally decisive but that all considerations and circumstances of the kind we have mentioned are relevant to the question of ownership and are appropriate foundations for findings on that issue. • • • The bundle of rights which he retained was so substantial that respondent cannot be heard to complain that he is the 'victim of despotic power when for the purpose of taxation he is treated as owner altogether'."

The differences between the *Clifford* case and the case here presented are so pronounced as to require little comment. The present trust is not a short term trust nor is there any temporary re-allocation of income within an intimate family group. Nor is there any such broad control over the administration of the trust as was retained by the grantor in the *Clifford* case.

It is the petitioner's position that the attempted extension of the *Clifford* doctrine in the present proceeding goes so far as to conflict with that decision. The *Clifford* case indicates that there are limits to its application. The circumstances of the trust or the powers reserved must be such, under the *Clifford* rule, as to justify the conclusion that the grantor continued to be the owner. The absence of all of the elements stressed in the *Clifford* case indicates that the present trusts do not meet the tests of that case.

Decisions of the Circuit Court of Appeals, unreviewed by this Court, have indicated that control over income, when combined with broad management powers, may meet the test of the *Clifford* doctrine. These decisions hold, in effect, that control alone may be sufficient to invoke the doctrine of the *Clifford* case, regardless of the term of the

trust. It is not necessary, however, for this Court to overrule such decisions to find a conflict between the decision below and this Court's decision in the *Clifford* case. Whether or not these cases have carried the *Clifford* rule too far without the supervision of this Court, they fall far short of requiring taxability of the income to the grantor in the case at bar. Indeed, the limits indicated in such decisions as the *Buck* and similar cases show that a contrary result should have been reached in the instant proceeding under the facts and circumstances here presented.

The petitioner also submits that the decision below is in conflict with the decision of this Court in *Helvering v. Stuart, supra*, 317 U. S. 154 (1942). In that case this Court remanded a decision of the Seventh Circuit for redetermination of the taxpayer's liability under the provisions of Section 22(a), and took occasion to make some observations with respect to the application of the *Clifford* rule. This Court limited the rule of the *Clifford* case by emphasizing that the "non-material satisfactions" of a donor are not taxable as income. Referring to the power of the trustees (the petitioner, his wife and his brother) to distribute or withhold income until the children-beneficiaries attained the age of 25 years, the Court said:

> "Plainly, these distributions or accumulations were to be used for the economic advantage of the children of the settlors and to the amount of these distributions and accumulations would satisfy the normal desire of a parent to make gifts to his children. Is this alone sufficient to make the income of the trusts taxable to the settlors?
>
> "Disregarding for the moment the minority of some of the beneficiaries, we think not. So broad a basis would tax to a father the income of a simple trust with a disinterested trustee for the benefit of his adult child. No act of Congress manifests such an intention. *Economic gain realized or realizable by the taxpayer*

is necessary to produce a taxable income under our statutory scheme." [1] (Emphasis supplied.)

The Court went on to say that economic gain as distinguished from non-material satisfactions could be obtained "* * * through control of a trust so complete that it must be said that the taxpayer is the owner of its income."

In the present case the right to withhold income for the best interests of the children is plainly a right that may be exercised for the "economic advantage of the children," not of the grantor; nor are there any findings or any facts which tend to indicate the existence of control of the trust that is "so complete that it must be said that the taxpayer is the owner of its income." It thus appears that the very power upon which the Tax Court predicated its decision is a power which this Court has said is not sufficient to make the income taxable to the grantor of a trust. The present case is thus squarely in conflict with *Helvering v. Stuart.*

3. The Circuit Court of Appeals has decided an important question of federal law which has not, but which should be settled by this Court.

The question here presented is whether the retention by the grantor of an irrevocable trust of the power to distribute to or withhold income from the life beneficiary of the trust as the grantor shall deem for the "best interests"

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[1] This petitioner has already been held (by the decision of the Court of Appeals on the first review) to be taxable on that part of the income which he might have used to satisfy his obligation to support his sons, and the present case concerns only the balance of the income. The question whether the satisfaction of that obligation could constitute "economic gain" to the taxpayer is thus not involved in this proceeding, since the amount so taxable to him could not exceed the amount for which he is already taxable under the first decision. *Cushman v. Commissioner,* 153 F. (2d) 510, 514 (C. C. A. 2, 1946), holding that "* * * if taxation is to be predicated on that benefit, it should also be limited by that benefit."

of the beneficiary constitutes such control over the income of the trust as to require taxation of such income to the grantor under Section 22(a) of the Internal Revenue Code, pursuant to *Helvering v. Clifford*, 309 U. S. 331 (1940).

In the preceding section the petitioner has contended that the decision below is in conflict with the decisions of this Court in the *Clifford* and *Stuart* cases. The petitioner's position in this respect is that those decisions have indicated some boundary to the scope of the so-called *Clifford* rule and that the present case is beyond that boundary. If, however, it is considered that the *Clifford* case, as interpreted in the *Stuart* case, has not provided boundaries that are sufficiently definite to determine taxability in a case like the one here presented, then it is submitted that an important federal question is presented which has not been but which should be settled by this Court.

The implications of the *Clifford* rule have, in fact, been a source of difficulty to the lower courts. The *Clifford* decision has been cited by lower courts in over 200 decisions. In 1945 it was reported that the application of the *Clifford* principle had actually been litigated in 165 cases, of which the Government had won 76 and the taxpayers 77. *Eisenstein, Some Iconoclastic Reflections on Tax Administration* (1945), 58 Harv. L. Rev. 477, 492. Such litigation will continue, and in fact must continue, until this Court has announced how far it will go. It cannot be denied that there must be some limit to the elasticity of *Helvering v. Clifford*. Now or later, this Court is sure to find it necessary to declare the boundaries of its rule. The government has consistently refrained from applying for certiorari in cases of this type, possibly indicating its fear of an examination of the extensions of the *Clifford* rule which have been made by the lower courts. It is submitted that for this Court to delay longer in taking action will result in increasing immeasurably the burden, not only on the government and the litigant, but also on those con-

cerned with the preparation and administration of trusts, which results from the present uncertainty. The case here involved is submitted as one clearly presenting the issues most needing to be clarified, since it will permit this Court to determine the extent to which control over income, unaccompanied by other factors found to exist in the *Clifford* case, may justify taxability.

It is recognized that it may be desirable that the lower courts should develop, over a period of time, the details of a broad and general rule such as that in the *Clifford* case, before a too specific definition is handed down by this Court. The present state of the law in the Circuit Courts suggests, however, that action by this Court is already overdue. In *Stockstrom v. Commissioner*, 148 F. (2d) 491 (C. C. A. 8, 1945), one of the more than 40 opinions in which the *Buck* case has been cited, the Court of Appeals said:

> "It is to be wished, of course, that the field opened up by the *Clifford* case may come to have some definite monuments, but the doctrinal state in which the matter has been left by the Supreme Court permits, for the present, of only a case-by-case progression 'to determine precisely where the line shall be drawn between gifts of income-producing property and gifts of income from property of which the donor remains the owner, for all substantial and practical purposes.' *Harrison v. Schaffner*, 312 U. S. 579, 583, 584."

Judge Sanborn, concurring in the same decision, added:

> "I think it is unfortunate that courts which are required to determine such controversies as this must express opinions which are obviously little more than guesses. The number of cases in which the doctrine of *Helvering v. Clifford, supra,* is invoked indicates the difficulty which the Bench and Bar are having in applying that doctrine."

But Judge Learned Hand, who had concurred in the *Buck* case, said later in *Kohnstamm v. Pedrick*, 153 F. (2d) 506 (C. C. A. 2, 1945):

"The test is impalpable enough at best; but if it is to be continually refined by successive distinctions, each trifling in itself, we shall end in a morass from which there will be no escape; and the spate of decisions already poured upon us will be the earnest of eventual utter confusion."

The foregoing and other comments of the lower courts indicate the need for clarification of this subject.

4. The Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

On the first appeal to the Circuit Court of Appeals careful consideration was given to the interpretation of the trust instrument and the Court clearly concluded, as stated in its opinion at 144 F. (2d) 683, 688 (Record, p. 142):

> "The income of the trust was payable directly to the son as a matter of right and without restriction when he became of age."

The opinion of the Tax Court at the later hearing is equally clear, but precisely to the opposite effect. The opinion of the Tax Court is grounded solely on the contrary interpretation of the agreement as is indicated by the following language, in which the authorities cited by the petitioner are distinguished:

> "Plainly, therefore, since in the instant case the petitioner as grantor had the power *completely* to withhold the income and the trust endured *during the lifetime of the beneficiary*, the *Hall* case is of no assistance, but indicates rather that, under the circumstance involved in the situation here at hand, the answer would be different." (Emphasis supplied.) (Record, p. 108.)

On the second review by the Circuit Court, the normal procedure would have been for that Court to remand the case to the Tax Court with instructions to proceed in ac-

cordance with the opinion of the first review if, indeed, the Circuit Court did not enter judgment for the petitioner. Instead, however, the Circuit Court, a different panel of judges sitting,[2] merely affirmed the decision of the Tax Court without any opinion of its own. Nor is the situation clarified by the Circuit Court's denial of the motion for rehearing (Record, p. 167) when it is considered that the motion clearly pointed out the unusual situation, and stressed particularly the need for an opinion to clarify the effect of the Court's decision; but the motion for rehearing was likewise denied without an opinion.

A litigant has no constitutional or statutory right to an opinion from a reviewing court, but when a case is presented involving an important precedent, which had attracted dissents in the Court below, and where the lower Court had in effect overruled the reviewing Court and based its decision thereon, it is submitted that this Court should exercise its supervisory jurisdiction on the ground that the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of such power.

5. Review of the decision of the Circuit Court of Appeals is not prevented by the rule of Dobson v. Commissioner, 320 U. S. 489 (1943).

The *Dobson* case held that a decision of the Tax Court should not be reversed except where a "clear-cut question of law" is presented, and that conclusions of ultimate fact for which there is "warrant in the record" should not be disturbed. It is understood that the *Dobson* rule is not one affecting the jurisdiction of this Court, nor does it determine the propriety of granting certiorari, especially where,

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[2] The panel of judges on the first appeal consisted of Circuit Judges Simons (presiding), Hamilton and McAllister, and the opinion was by Judge Hamilton. The panel of judges on the second appeal consisted of Circuit Judges Allen (presiding), Martin and Miller.

as here, the Court of Appeals has decided the case on the merits; that the rule, where applicable, is one which points toward affirmance of the Tax Court, rather than denial of certiorari. It is therefore assumed that extensive argument on this point should properly be postponed until the argument on the merits of the case, in the event that certiorari is granted.

If certiorari is granted the petitioner is prepared to demonstrate that the question here involved is a question of law in that it involves the determination of the proper standard to be applied in the application of Section 22(a), rather than the determination whether that standard has been satisfied. Moreover, it is to be noted that the questions raised here are being treated by the lower courts and by the Treasury as questions of law. The decisions of the Circuit Courts in the *Hawkins*, *Stockstrom*, *Hall*, and *Buck* cases, as well as in the present case, all treat the problem as one of law. Moreover, the Treasury has issued regulations defining the scope of the *Clifford* rule in an attempt to solve the same legal problems as are presented here.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

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APPENDIX.

Revenue Act of 1936, 49 Stat. 1648-1756, and Revenue Act of 1938, 52 Stat. 447-584:

"SEC. 22. GROSS INCOME.

"(a) GENERAL DEFINITION.—'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *"

In so far as is relevant to this case, the provisions of the corresponding sections in all other revenue acts to which reference has been made in the petitioner's brief, as well as the provisions of the corresponding section in the Internal Revenue Code, are identical with the above.